

## **EXHIBIT 3**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

LP MATTHEWS, L.L.C.	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 04-1507 (SLR)
v.	)	
	)	
BATH & BODY WORKS, INC.; LIMITED	)	
BRANDS, INC.; KAO BRANDS CO.	)	
(f/k/a THE ANDREW JERGENS	)	CONFIDENTIAL
COMPANY); and KAO CORPORATION	)	
	)	
Defendants.	)	
	)	

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**UPDATED EXPERT REPORT OF CHRISTOPHER T. RHODES  
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 26(A)(2)(b)**

Pursuant to Rule 26(A)(2)(B), Fed. R. Civ. P., and on behalf of Plaintiff L.P. Matthews, LLC ("Matthews"), I submit the following report updating my opinions in this matter. Updating is necessary because, on February 28, 2006 (the same day my original report was submitted), Defendants Limited Brands, Inc. and Bath & Body Works, Inc., et al. (collectively, "the Limited defendants") provided to plaintiff's counsel a February 10, 2006 declaration from one of their suppliers. I reserve the right to supplement or modify the opinions expressed herein and the bases for these opinions depending on the proofs presented by the Limited defendants and by Kao Corporation and Kao Brands Company (collectively "the Kao defendants") or on additional discovery or other information provided by any defendant.

**AS FILED IN ORIGINAL REPORT FEBRUARY 28, 2006**

**INTRODUCTION**

**I. ENGAGEMENT AND COMPENSATION**

I have been engaged by the law firm of Robins, Kaplan, Miller & Ciresi L.L.P. to render an opinion regarding whether the claims of U.S. Patent No. 5,063,062 ("the '062 patent") read on

certain products made or sold by the Limited and Kao defendants. I am being compensated at my usual rate of \$600 per hour for non-testifying work and \$700 per hour during testimony related to this matter. I plan to rely on information reviewed and demonstrative exhibits illustrating the points I have made in this report to support my testimony at trial.

## **II. QUALIFICATIONS AS AN EXPERT WITNESS**

I obtained my Bachelor and Ph. D. degrees in Pharmacy from the University of London in 1961 and 1964. My Ph. D. research focused on the interaction between organic materials (*e.g.* oils) and surfactants (*i.e.* materials with soap-like qualities). During the past 40 years, a significant proportion of my University research activities has focused on the design and evaluation of systems containing surfactants, *e.g.* lotions and creams. Additionally, I have consulted for pharmaceutical, cosmetic, and home products companies on the formulation and evaluation of topical products designed for cosmetic or pharmaceutical purposes. A copy of my *curriculum vitae* is attached as Exhibit 1.

## **SUMMARY OF OPINIONS AND TESTIMONY**

### **II. ORDINARY SKILL**

It is my opinion that persons skilled in the art and able to benefit from the teachings of U.S. Patent No. 5,063,062 (“the ‘062 patent”) have an educational background that at least is equivalent to an associate’s degree in chemistry or a related discipline. Apart from education, a person skilled in the art has at least one-two years experience in the formulation of comparable products. The ‘062 patent is attached as Exhibit 2.

### **III. FUNDAMENTAL COLLOID AND INTERFACE CHEMISTRY**

A large proportion of the materials that we deal with in everyday life are called “organic” chemicals. The term organic means the materials are carbon-based structures. Typical organic chemicals have low water solubility. They are therefore characterized as being hydrophobic

(“water-fearing”) or lipophilic (“oil-loving”). Organic chemicals of this type dissolve only to a limited extent in water. In contrast, many other materials are hydrophilic (“water-loving”) or lipophobic (“oil-fearing”). These materials will dissolve readily in water, but dissolve only to a limited extent in oil.

There are some substances that have within the same molecular structure both hydrophilic and hydrophobic parts. These substances are sometimes referred to as amphiphiles. Because of their dual nature (hydrophilic and lipophilic regions in the same molecule), these substances tend to accumulate at interfaces, *e.g.* between water and air or between water and a solid surface or between oil and water. Thus, they are often called surfactants.

In water-based systems, even when present at very low percentages, surfactants can stabilize small droplets of oil dispersed in the system. Such systems are termed emulsions, microemulsions, or solubilized systems. The surfactant in these systems is present at the interface between the water and oil components and provides a link between the two. The water-loving part of the surfactant protrudes into the water component while the oil-loving part protrudes into the oil component. Thus the surfactant functionally stabilizes the two incompatible components. An example of such a system is olive oil dispersed in water with the aid of an edible surfactant, which provides the basis of many salad dressings. Over time, such systems may “break.” This is marked by the separation of the oil and water components.

To dissolve many hydrophobic materials, *e.g.* ranging from tar-like substances to make-up, a lipophilic (hydrophobic) substance such as gasoline could be used. Because many such substances are irritants or otherwise toxic to human skin, this approach has limited value in cosmetic applications.

Cleaning human skin can be performed with a cleaning composition that is used to treat the material to be cleaned or, alternatively, with the additional step of removing the material to

be cleaned, as by rinsing, wiping, or the like. Such cleaning composition may have surfactants and organic solvents such as oils. In these systems, the organic solvent (hydrophobic) has cleaning properties. The surfactant, which also has cleaning properties, disperses organic solvent by acting as stabilizing agent.

In the context of the '062 patent, the oat ingredients, which are surfactants, function as stabilizing agents (emulsifying agents). Other such agents may also be present in the system and play a role in the emulsification process. The orange oil is an organic solvent, though other such agents also may be present in the system.

#### IV. CLAIM ELEMENTS

The language used in claims 6 and 9 of the '062 patent would be simple and easy for a person of ordinary skill in the art of that patent to understand. My opinion about that understanding follows.

The claim preambles of both claims call for a cleaning composition for use on human skin. Such a composition is one that is used to treat a substance on the skin in order that the substance may be removed. According to the Limited defendants' corporate designee, the perception of the consumer is a reliable test for the effect of a particular product. (Ex. 3, Transcript of Rule 30(b)(6) Deposition of Konstantinos Lahanas at 597:11-20.) This is consistent with the kind of testing reported in the specification of the '062 patent to evaluate the cleaning effect of the invention. (Ex. 2 at 3:14-17.)

The claim term "orange oil" means the non-water soluble part of an orange. (*E.g.* Ex. 25 (defining orange<sup>1</sup>); Ex. 3 at 149:12-151:14.) Based on U.S. Patent No. 5,013,485 ("the '485 patent"), I conclude that orange oil can perform cleaning at levels of 0.01% or lower. (Ex. 4.)

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<sup>1</sup> Mandarin oranges, Navel oranges, bitter oranges, sour oranges, Seville oranges, sweet oranges, and tangerines are oranges. Should the Court construe the term "orange" inconsistent with this ordinary meaning, then, at a minimum, there are insubstantial differences between each of these types of oranges.

According to the claim language, neither claim 6 nor claim 9 require a minimum percentage of orange oil, provided it is present.<sup>2</sup>

The claim term “oat grain derivative product as an emulsifying agent” means any product derived from an oat grain<sup>3</sup> that can function to physically stabilize an oil and water system.<sup>4</sup> The claim term “oatmeal” means any product derived from an oat kernel. (See Ex. 3 at 361:21-22.)

The claim terms “pharmaceutically acceptable moisturizer” mean any constituent in the product that attracts water or prevents water loss and is generally regarded as safe for topical use in pharmaceutical or cosmetic products.

The claim term “pH” means the negative common logarithm of hydrogen ion activity, *i.e.* a measure of acidity or alkalinity, with less than 7 being acidic, more than 7 being alkaline (basic), and 7 being neutral. In my opinion, the skilled artisan would understand the claim 6 element “4.5 to 6.0, inclusively” to mean 4 to 6.5. It is noted that the patent does not require any particular method of measuring pH. Someone skilled in the art would be aware in 1989 that pH can be determined either colorimetrically (using test papers impregnated with various pH indicators) or potentiometrically (using a pH meter and electric current). Potentiometric methods provide more precise measurements than colorimetric methods. Commonly, a precision of  $\pm 0.01$  of a pH unit may be obtained with potentiometric measurement. Examination of the patent indicates that the inventors probably used colorimetric methods to define their invention. The

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<sup>2</sup> I understand from plaintiff's counsel that the defendants argue that claims 6 and 9 require five percent (5%) or more of orange oil in the claimed composition. I find no reason in either the '062 patent claims or its specification for imposing that limitation on claims 6 and 9. Even if the claims were so limited, any percentage of orange oil that had a cleaning effect would perform the same function (treating an unwanted substance on the skin to facilitate removal of that substance) in the same way (by applying the product to the skin) to achieve the same result (facilitating removal of the unwanted substance). The Limited defendants acknowledge that 1% orange oil in an accused product may have a cleaning effect. (Ex. 20 at 2.) The Kao defendants' '485 patent indicates the range of such equivalents, if such analysis were necessary, is 0.01% or less. (Ex. 4.)

<sup>3</sup> An oat grain includes a kernel and a husk.

<sup>4</sup> The inventors described the action of emulsifying broadly in the patent specification. (*E.g.* Ex. 2 at 4:19-30.) According to that description, the skilled artisan would interpret the term “emulsifying agent” as including emulsifying agents that act in solubilized systems and in microemulsions.

term pH in Tables 1, 2 and 3 in the '062 patent are all accompanied by the term "Approximate." This clearly suggests to the skilled artisan that the values given are imprecise rather than precise, suggesting that the colorimetric method would be sufficient for the purposes of the patent-in-suit. This conclusion is buttressed by the fact that all the pH values in the patent, save one, report pH as being either an integer or an exact half of a pH unit (e.g. 4 or 4.5). This clearly indicates that the inventors were using an implied precision of plus or minus 0.5 of a pH unit or greater. Thus, in interpreting the pH range in claim 6, a conservative definition of the range claimed would be 4.0 to 6.5, inclusively. Finally, the patent indicates that the primary reason for the pH element is related to skin feel and similar attributes of the invention. (Ex. 2 at 6:18-27.) This further supports my conclusion that the colorimetric measurement is sufficient to define the invention since, unlike pH control for say an intravenous invention, precise control of pH is not critical..

**UPDATED FROM ORIGINAL REPORT**

**V. CATEGORIZATION OF ACCUSED PRODUCTS**

The accused products in this case fall into two categories based on their labels. The first has a direct and explicit indication of some type of cleaning function. The second, although without direct cleaning function instructed, clearly indicates function that includes facilitating removal of or actually removing unwanted material from the skin. Thus, Category B products are expected to have a cleaning function. The products are identified by category in Table 1.

**Table 1. Categories of Accused Products**

<b>A. Direct Claim of Cleaning Indication</b>	<b>B. Expected Cleaning Function</b>
BBW Mango Mandarin Creamy Body Wash	BBW Mango Mandarin Body Lotion
TBS Better Lather Than Never Bubble Bath and Shower Cream	BBW Cool Citrus Basil Body Lotion
BBW Mango Mandarin Skin Refining Body Scrub	BBW Mango Mandarin Hand Repair & Healing Hand Cream
BBW Mango Mandarin Skin Renewal & Anti-Aging Body Wash	BBW Mango Mandarin Skin Repair & Healing Body Butter
BBW Mango Mandarin Skin Renewal &	PS Salt Toning Body Balm



Anti-Aging Body Wash	Murad Resurgence Sheer Lustre Day Moisture
Burt's Bees Citrus Facial Scrub	
Burt's Bees Orange Essence Facial Cleanser	Murad Resurgence Age-Diffusing Serum
TBS Good Clean Foam Face Wash	Murad Resurgence Age-Balancing Night Cream
PS Ginger Rejuvenating Shower Foam	Murad Skin Perfecting Lotion
PS Ginger Rejuvenating Body Scrub	Murad Acne Spot Treatment
Curél Extreme Care Face Wash	PS Ginger Rejuvenating Body Lotion
Curél Extreme Care Body Wash	PS Oat Oil-Control Face Moisturizer
	PS Burdock Root Skin Mattifier
	PS Ginger Rejuvenating Body Balm
	PS Ginger Rejuvenating Hand & Nail Cream
	PS Fig Hydrating Body Balm
	PS Fig Hydrating Hand & Nail Cream
	PS Everlasting Flower Night Nourisher
	Curél Ultra Healing
	Curél Extreme Care Lotion

For products in the Category B, I consider information obtained at deposition to show that the products indeed perform a cleaning function, which information is discussed in the sections that follow. (See also, *e.g.*, Ex. 3 at 433:15-435:2, 521:14-522:12; Ex. 58 at 77:20-79:4, 137:5-139:3.) Further, my evaluation of the component information on the two categories of products reveals substantial similarities between products in the two categories. Thus, since the products in the Category A are explicitly labeled to perform a cleaning function, it is difficult to conceive that the products in the Category B do not also perform some cleaning functions. In my opinion, therefore, all the products in Table 1 literally meet the human skin cleaning composition claim element of claims 6 and 9 of the '062 patent.

However, in the event that the Court decided that the label of the Category B products was such that they did not literally infringe, then I conclude that they would infringe under the so-called doctrine of equivalents. I understand from plaintiff's counsel that the test for infringement under this doctrine is whether the accused product meets a given claim element by



performing substantially the same function in substantially the same way to achieve substantially the same result, or whether there are insubstantial differences between the product and the given element. In this regard, the Category B products perform substantially the same function (treating unwanted substances on the skin to facilitate removal of those substances) in the substantially same way (applying the product to the skin) to achieve substantially the same result (facilitating removal of the substance). Consequently, in my opinion, the differences between the Category B products and the human skin cleaning claim element of claims 6 and 9 of the '062 patent are insubstantial.

## **VI. LIMITED DEFENDANTS' ACCUSED PRODUCTS**

### **A. Orange Oil Ingredients**

In deciding whether it is reasonable to conclude whether claims 6 and 9 of the '062 patent read on the Limited defendants' accused products, I understand that the Limited defendants had access to additional information about the quantity of orange oil in some of their products but did not provide that information to the plaintiff's attorneys. The Limited defendants identified accused products "contain one or more of the following 'orange' ingredients: Actiphyte of Orange Peel, Citric Acid, Mandarin Orange Fruit Extract, Unitanical Orange Peel, Mandarin Orange Blend, and Mandarin Orange Extract." (Ex. 5 at 6-7.) The Limited defendants' corporate designee also testified repeatedly that fragrances in the accused products may contain orange oil. For all of these orange ingredients, the designee testified that that the Limited defendants had or ordinarily obtained the orange oil information. But he also testified that the information provided in the litigation was sufficient to do so.<sup>5</sup>

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<sup>5</sup> The Limited defendants' corporate designee testified as follows:

Q. Did you receive instructions about what to do to prepare for the deposition?

MR. HILL: Again, I am going to caution the witness to not reveal the substance of any attorney/client information.

A. Yeah.

Absent more specific quantitative information about the orange oil content in some of the accused products, I have no choice but to base my opinions on the interpretation of the information as provided to counsel by the Limited defendants. I conclude that proceeding in this manner to the extent necessary is reasonable in view of the Limited defendants' corporate

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Q. What steps did you take to identify the percentage of orange oil in each accused product as called for by topic number 3?

A. I accepted the information accumulated as is.

Q. What do you mean by that?

A. Documents such as these.

Q. "These" being the batch records and formula sheets?

A. Yes.

Q. What do you mean by you accepted them?

A. I believe them to be true.

Q. And those documents, do they quantify the percentage of orange oil in each accused product?

A. To my level of satisfaction.

MR. HILL: Object to the question; the documents speak for themselves in terms of quantities of ingredients in the accused products.

Q. (BY MR. BURATTI:) Did you see in preparing for your deposition any documents that give the percentage of orange oil in the accused product?

A. Beyond what's already presented, no.

Q. Did you see any documents that specify a percentage of the orange oil in the accused products?

A. Did I see any documents that specify the -- beyond the formulas presented? No, in preparation for my deposition.

Q. Do the formulas that we reviewed during the deposition specify the percentage of orange oil in the accused products?

A. They speak for themselves.

Q. Do they specify the percentage of orange oil that's in the accused products?

A. I don't know how to answer you.

Q. Do the formula sheets and manufacturing records that you reviewed in preparation for the deposition identify with any precision the percentage of orange oil that's in the accused products?

A. They set upper limits for the percentage of orange oil in the accused products.

Q. Do they set lower limits?

A. No, they do not.

Q. What are the upper limits that are set?

A. One would have to go through each product individually and ascertain that.

Q. And how would I go about doing that?

A. In general terms, not speaking of any one product?

Q. Yes.

A. We discussed many products here. There was much doubt as to the composition of fragrance because that is information that is not easily obtainable, especially with any precision.

One could ask if the fragrance houses would be so kind as to divulge a range of orange oil used in their fragrances, and one could calculate on the other ingredients the extracts or analyze for maximum limits of possible orange oil content, and add it up.

Q. So separate analytical testing?

A. Correct. Or existing information, if it exists.

Q. I just want to make sure that I'm clear.

The fragrance composition sheet tells me the percentage of orange oil?

A. It will at best give you a range of orange oil, which is why I answered you can set upper bounds. And that is, of course, provided the fragrance house divulges it.

(Ex. 3 at 726:10-730:4; see also Ex. 5 at 6-17.)

designee's repeated testimony that the information provided was sufficient for these purposes.<sup>6</sup>

Where quantitative ingredient composition data was provided with ranges, I based my opinion on the maximum number in the range. Where no quantitative ingredient composition data was provided, I based my opinions on information supplied on similar ingredient compositions.

Where the term extract or blend is used, I based my opinion on the material comprising no more than 50% of an oil.<sup>7</sup> This results in the orange oil percentages for orange ingredients as stated in Table 2.

**Table 2. Orange Oil Ingredients in Limited Defendants' Products**

<b>Ingredient</b>	<b>% Orange Oil</b>	<b>Exhibit (Illustrative with Interpretation<sup>8</sup>)</b>
Firmenich Fragrance 118185	36.4	69, 8
Firmenich Fragrance 118185 G	10.4	69, 6
Firmenich Fragrance 118185 W	25	69, 7
Firmenich Fragrance 137708	1	(Like 125887, Range)
Firmenich Fragrance 161375 B	2.9	69, 9
Firmenich Fragrance 125887	1	69, 10
Firmenich Fragrance 125887 D	1	(Like 125887, Range)
Firmenich Fragrance 125887 B	1	11 (Range)
Firmenich Fragrance 143390 E	5.9	69
Firmenich Fragrance 143935 B	4	69, 12
Fragrance UJ002881/00 Bio Fresh Face	7	13 <sup>9</sup>
Fragrance 2408-BE True Blue	50	(Like orange ingredients, Range)
Mane Fragrance 133158	1.67	14
Mane Fragrance 133506	0.56	15
Actiphyte of Orange Peel	50	3 at 187:9-192:18; (Like orange ingredients, Range, "Orange Peel")
Extract of Mandarin DCF 345 NAS 0228-13	50	3 at 495:12-496:22; (Like orange ingredients, Range)

<sup>6</sup> See previous footnote; see also Ex. 3 at 204:1-206:1.

<sup>7</sup> The extract must either be oil or water (or a mixture). (See, e.g., Ex. 3 at 200:6-201:18.)

<sup>8</sup> Where my interpretation included the application of a range value, minimum percentages can also be calculated.

<sup>9</sup> At a minimum, this product contains 6% orange oil. (Ex. 13.)

Mandarin Orange Fruit Extract C3256 WS	50	3 at 198:13-18, 202:12-14, 514:16-18; (Like orange ingredients)
Mandarin Orange Extract VT-0137.000W	0.002 (in product)	16 (specifying % in product)
Mandarin Orange Blend VT-0267.000B	50	3 at 187:6-8, 202:15-18, 236:1-
Mandarin Orange Extract VT-0267.000W		7; (Like orange ingredients, Range)
Unitanical Orange Peel R10593	39	17; 3 at 202:21-203:16, 208:9-214:4, 343:4-11, 469:6-474:2, 606:20-607:2

### ***B. Oat Ingredients***

The fact that an oat ingredient has areas that are lipophilic and other areas that are hydrophilic clearly indicates the potential of that substance to function as an emulsifying agent in a oil and water composition. Each of the accused products listed below is such a composition. Further, since in the accused formulations other surfactants are present, the total emulsifying activity will be due to a combination of action by the oat and the other materials (*i.e.* primary, secondary, or tertiary emulsifying agents) in a synergistic fashion. Accordingly, the oat ingredients add to the overall emulsifying effect of the other surfactants, with each surfactant (including oat) acting as an emulsifying agent.

In the case of the accused products, the Limited defendants state that each product contains up to 3% of “any ingredient that could potentially be considered an oat grain derivative.” (Ex. 20 at 4.) They specified that the accused products contain these oat ingredients: “oat kernel protein, oat extract, sodium lauroyl oat amino acids, Unitanical oats, Actiphyte of oat, hydrolyzed oat protein, oat kernel oil, and oat protein powder.” (Ex. 21 at 2-3.) Based on that list, I have categorized the oat ingredients in the accused products (to the extent possible) in Table 2.

**Table 3. Oat Ingredients in Limited Defendants’ Products**

Category	Ingredient <sup>10</sup>	Exhibit (Illustrative)
oat kernel protein	Hydrolyzed Oat Protein	3 at 120:14-128:14, 143:10-13, 251:5-19, 339:20-340:4, 346:9-347:16, 362:14-16, 20-363:2, 401:22-402:5; see also Ex. 63
oat extract	Avena Sativa (Oat) Bran Extract	3 at 120:14-128:14, 143:10-13, 222:9-224:5, 339:20-340:4, 362:17-363:2, 491:3-13
sodium lauroyl oat amino acids	Sodium Lauroyl Oat Amino Acids	3 at 120:14-128:14, 143:10-13, 339:20-340:4, 342:8-12, 352:15-353:2, 362:14-16, 20-363:2,
oat extract	Avena Sativa (Oat) Kernel Extract	3 at 143:10-13, 339:20-340:4, 362:17-363:2
oat kernel oil	Avena Sativa (Oat) Kernel Oil	3 at 120:14-128:14, 143:10-13, 339:20-340:4, 347:17-348:9, 362:20-363:2, 663:3-665:21
no category	Oat Flour	3 at 126:20-127:7, 143:10-13
oat kernel protein	Oat Protein	3 at 120:14-128:14, 143:10-13, 339:20-340:4, 362:14-16, 20-363:2; see also Ex. 63
oat kernel protein	Avena Sativa (Oat) Kernel Protein	3 at 120:14-128:14, 143:10-13, 168:11-169:13, 339:20-340:4, 362:14-16, 20-363:2; see also Ex. 63
oat kernel protein	AC Oat Protein Powder	22; 3 at 120:14-128:14, 339:20-340:4, 143:10-13, 362:14-1620-363:2; see also Ex. 63
oat kernel protein	Drago Beta Glucan	23; 3 at 120:14-128:14, 143:10-13, 339:20-340:4, 362:14-1620-363:2,, 673:14-674:22, 702:8-703:19
Unitanical oats	Unitanical Oat R10605 <sup>11</sup>	19; 3 at 120:14-128:14, 143:10-13, 209:15-217:21, 222:12-223:1, 339:20-340:4, 343:2-344:5, 362:20-363:2, 469:16-473:20, 606:20-607:2, 621:8-11, 645:17-18
Unitanical oats	Unitanical Oat WS R10655 <sup>12</sup>	24; 3 at 120:14-128:14, 209:15-217:21, 343:2-344:5, 357:4-14, 573:8-11,
Actiphyte of oat	Actiphyte of Oat	3 at 345:15-350:13

As shown by the exemplary citation to the Limited defendants' deposition testimony, the oat ingredients in Table 3 are products derived from oats (*E.g.*, Ex. 3 at 361:10-20), meeting that

<sup>10</sup> I conclude from the testimony that the ingredient is about 100% oat derivative unless indicated otherwise.

<sup>11</sup> This ingredient contains 39% Avena Sativa (Oat) Bran Extract. (Ex. 19.)

<sup>12</sup> This ingredient contains 2.5% oat derivative. (Ex. 24.)

requirement of claim 6. (*E.g.*, Ex. 3 at 361:17-20.) The designee also testified that the oat ingredients in Table 3 are made from processed oat kernels, meeting both the claim 6 element “oat grain derivative product” and the claim 9 element “oatmeal.” See Section IV, above; (*e.g.*, Ex. 3 at 362:20-363:2). The designee further testified that each oat ingredient contains hydrophilic and lipophilic regions. (*E.g.*, Ex. 3 at 143:10-13 (oats contain both hydrophilic and lipophilic regions).) I therefore conclude that it is more likely than not that each oat ingredient in Table 2 functions as an emulsifying agent in the accused product that contains it (synergistically with any other such agents as explained above), meeting the requirement of claim 9 that the “oat grain derivative product” function “as an emulsifying agent.” See Section III, above; (*e.g.*, Ex. 3 at 126:20-127:7 (all proteins can emulsify), 141:1-7 (all proteins are composed of amino acids), 340:1, 3-4 (all proteins contain both hydrophilic and lipophilic regions), 224:6-17). I note that claim 9 does not require an oat ingredient to function as an emulsifying ingredient.

In my opinion, each of the accused products contains oil and water components and the Table 3 oat ingredient (or ingredients) in that product functions (or function) as an emulsifying agent within the accused product that contains it.

### ***C. pH***

The Limited defendants’ corporate designee testified that products typically are released after investigation when the finished product tested as much as 0.3 pH units outside the specification for that product. (Ex. 3 at 786:8-800:9.) This is consistent with both my conclusion concerning the imprecise nature of the pH claim element in claim 6 of the ‘062 patents and a broad range of equivalents for that element. Further, there is nothing to prevent the Limited defendants from making and selling product with a pH at least as much as 0.3 pH units outside the range stated in the product specifications.



**D. Products**

I conclude that each of the following products contains one or more pharmaceutically-acceptable moisturizers, meeting the moisturizer claim element of claims 6 and 9. This conclusion is based on the testimony of the Limited defendants' corporate designee and the exhibits to this report. Based on that conclusion and the opinions and facts discussed in this report, I further conclude that each of the following products infringes claims 6 and/or 9 of the '062 patent as stated below. As an initial point, when queried about all of the products listed here, the Limited defendants' corporate designee testified:

Q Does every one of those products have a cleaning effect?

A If we are stating that oils have a cleaning effect, any emulsified product has an oil phase. So then every emulsifying product not only on Exhibit 52 but in the industry by that definition would be a cleanser.

(Ex. 3 at 433:15-434:1.)

**i. Bath & Body Works Mango Mandarin Creamy Body Wash**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin. (Ex. 3 at 298:19-22.) Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The designee also testified that this product contains orange oil. (*Id.* at 299:1-9.) The ingredient list for this product shows that it contains 0.05% Mandarin Orange Blend and 1.5% Firmenich Fragrance 118185 G. (Ex. 26.) Based on these ingredients as discussed above, this product contains 0.181% orange oil (0.025% from Mandarin Orange Blend and 0.156% from the



fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.125% Hydrolyzed Oat Protein (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 5.5 - 5.8. (Ex. 27.) This range is within the claimed range of 4.5 - 6.0 as explained above, meeting this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff's counsel is 5.69. (*Id.*) That average pH is also within the claimed range of 4.5 - 6.0 as stated above, which also meets this claim element. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

**ii. True Blue Spa Better Lather Than Never Bubble Bath and Shower Cream**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin. (Ex. 3 at 371:1-13.) Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The designee also testified that this product may contain orange oil in the fragrance and Actiphyte of Orange Peel ingredients. (*Id.*) The ingredient list for this product shows that it contains 1.5% Fragrance 2408-BE and 0.05% of Actiphyte of Orange Peel. (Ex. 28.) Based on these ingredients as discussed above, this product contains 0.775% orange oil (0.025% from Actiphyte of Orange Peel and 0.75% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 1.25% Avena Sativa (Oat) Kernel Protein (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 5.5 - 5.8. (Ex. 27.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff's counsel is 5.69. (*Id.*) That average pH is also within the claimed range of 4.5-6.0 as stated above, which also meets this claim element. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

**iii. Bath & Body Works Mango Mandarin Skin Refining Body Scrub**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin:

Q ...BBW Mango Mandarin Skin Refining Body Scrub is a product that's designed and used to remove that unwanted material from the skin?

A Yes, to physically smooth out the skin. This product also does get rinsed off after use.

(Ex. 3 at 506:16-507:9.) Therefore, this product literally meets the skin cleaning composition claim element of claim 9.

The designee also testified that this product "might" contain orange oil in the fragrance. (*Id.* at 507:10-11.) The orange oil also comes from the extract of mandarin in the product. (Ex. 29; see Ex. 3 at 198:13-18.) The ingredient lists for this product show that it contains 0.05% Extract of Mandarin DCF 345 NAS 0228-13 and 1.0% Firmenich Fragrance 118185 W. (Ex. 29.) Based on these ingredients as discussed above, this product contains 0.275% orange oil (0.025% from Extract of Mandarin and 0.25% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claim 9 as stated above.

The ingredient list for this product shows that it contains 0.05% Oat Bran Extract (*id.*), meeting the oat element of claim 9 as stated above.

**iv. Bath & Body Works Mango Mandarin Skin Renewal & Anti-Aging Body Wash**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin. (Ex. 3 at 537:22-538:3.) Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

He also testified that this product "might" contain orange oil in the fragrance and mandarin orange extract. (*Id.* at 538:4-10.) The ingredient list for this product shows that it contains 0.05% Mandarin Orange Extract VT-0267.000B and 1.5% Firmenich Fragrance 118185 W. (Ex. 30.) Based on these ingredients as discussed above, this product contains 0.4% orange oil (0.025% from Mandarin Orange Extract and 0.375% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 1.5% Sodium Lauroyl Oat Amino Acids (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.5 - 7.5. (Ex. 27.) This range permits sales of the product with a pH that meets the claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

**v. Bath & Body Works Mango Mandarin Body Lotion**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin:

Q Is [BBW's Mango Mandarin Body Lotion ] used to treat dry skin?

A Yes.

Q Is dry skin a substance that you want to have on your skin?

A Dry skin is a part of you you want to remediate.

Q What do you mean by remediate?

A You're not looking to remove it.

Q No?

A Not necessarily.

Q The top layer of dry skin?

A This is not an exfoliating product, as far as I can tell.

Q Not specifically?

A I would not expect this product to be an exfoliating product.

Q Okay. I want to make sure that my question is clear. I'm not asking about removing --

A You did say remove unwanted things.

Q To treat. I said to treat.

A I'm sorry. I believed you said remove. I stand corrected.

Q Okay. Let me ask the question again. Is BBW's Mango Mandarin Body Lotion a composition that's used -- I'm sorry -- a composition that treats unwanted material on your skin?

A If you're referring to oneself as material, yes.

(Ex. 3 at 591:13-592:20.) The designee testified that all of the BBW lotions treat dry skin. (*Id.* at 604:14-18, see generally Ex. 3 at 62-178; see also Transcript of Deposition of Jack Krause at 462:2-4, 3-11 .) I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The designee also testified that this product may contain orange oil in the fragrance and mandarin orange blend. (*Id.* at 592:21-593:22.) The ingredient list for this product shows that it contains 0.05% Mandarin Orange Blend and 2.0% Firmenich Fragrance 118185. (Ex. 31.) Based on these ingredients as discussed above, this product contains 0.753% orange oil (0.025% from Mandarin Orange Blend and 0.728% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.05% Actiphyte of Oat (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.0 - 6.8. (Ex. 27.) This range permits sales of product with pH within the claimed range of 4.5-6.0 as explained above, which meets this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff's counsel is 6.45. (Ex. 27.) That average pH is also permits sales of product that meet this claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

#### **vi. Bath & Body Works Cool Citrus Basil Body Lotion**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin:

Q [BBW Cool Citrus Basil Body Lotion]'s a body lotion like the last two products we talked about?

A Yes, sir.

\*\*\*

Q Does BBW Cool Citrus Basil Body Lotion treat dry skin?

A Yes, it does.

(Ex. 3 at 618:21-619:1 (referring to, *inter alia*, BBW Mango Mandarin testimony above), 639:9-11.) I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The designee also testified that this product “might” contain orange oil in the fragrance and mandarin orange blend. (*Id.* at 619:2-10.) The ingredient list for this product shows that it contains 0.05% Mandarin Orange Blend and 2.0% Firmenich Fragrance 137708. (Ex. 32.) Based on these ingredients as discussed above, this product contains 0.045% orange oil (0.025% from Mandarin Orange Blend and 0.02% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.05% Actiphyte of Oat (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.0 - 6.8. (Ex. 27.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff’s counsel is 6.39. (*Id.*) That average pH is also permits sales of product that meet this claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the ‘062 patent.

**vii. Bath & Body Works Mango Mandarin Hand Repair & Healing Hand Cream**

The Limited defendants’ corporate designee testified that this product is a cleaning composition for human skin:

Q Does BBW’s Mango Mandarin Hand Repair and Healing Hand Cream treat dry skin?

A Yes.

(Ex. 3 at 657:22-658:11.) I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claim 9.

The designee also testified that this product may contain orange oil in the fragrance and mandarin orange extract. (*Id.* at 657:22-658:1.) The ingredient list for this product shows that it contains 0.05% Mandarin Orange Extract VT-0267.000B and 1.25% Firmenich Fragrance 118185. (Ex. 33; Ex. 66.) Based on these ingredients as discussed above, this product contains 0.48% orange oil (0.025% from Mandarin Orange Extract and 0.455% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claim 9 as stated above.

The ingredient list for this product shows that it contains 0.05% AC Oat Protein Powder (*id.*), meeting the oat element of claim 9 as stated above.

**viii. Bath & Body Works Mango Mandarin Skin Repair & Healing Body Butter**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin:

Q Does [BBW's Mango Mandarin Skin Repair and Healing Body Butter] treat dry skin?

A Yes.

(Ex. 3 at 662:4-5.) I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claim 9.

The designee also testified that this product "might" contain orange oil in the fragrance and mandarin orange extract. (*Id.* at 662:10-16.) The ingredient list for this product shows that it contains 0.05% Mandarin Orange Blend VT-0267.000W and 1.5% Firmenich Fragrance



118185. (Ex. 23.) Based on these ingredients as discussed above, this product contains 0.571% orange oil (0.025% from Mandarin Orange Blend and 0.546% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claim 9 as stated above.

The ingredient list for this product shows that it contains 0.10034% Avena Sativa (Oat) Kernel Oil and 0.10034% of Drago Beta Glucan (*id.*), meeting the oat element of claim 9 as stated above.

**ix. Pure Simplicity Salt Toning Body Balm**

The Limited defendants' corporate designee testified that this product is a cleaning composition for human skin:

Q Is Pure Simplicity Salt Toning Body Balm a product that treats dry skin?

A Yes, it is.

Q Does it treat flakiness?

\*\*\*

A All moisturizers treat flakiness.

(Ex. 3 at 672:1-7.) I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim element of claim 9.

The designee also testified that this product contains orange oil in Unitanical of Orange Peel. (*Id.* at 672:8-22.) The ingredient list for this product shows that it contains 0.5% Unitanical Orange Peel R10593. (Ex. 55.) Based on that ingredient as discussed above, this product contains 0.195% orange oil. I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil element of claim 9 as stated above.

The ingredient list for this product shows that it contains 0.1% Avena Sativa (Oat) Kernel Oil and 0.1% of Drago Beta Glucan (*id.*), meeting the oat element of claim 9 as stated above.

**x. Murad Resurgence Sheer Lustre Day Moisture**

In my opinion, this product is a lotion that has the same cleaning effect as the lotion products described above, treating dry skin and flakiness. I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

This product contains 0.2% Citrus Aurantium Dulcis (Orange) Oil. (Ex. 34.) I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

This product contains 0.7% Avena Sativa (Oat) Kernel Extract (*id.*), meeting the oat elements of claims 6 and 9.

This product contains several moisturizers, including Butylene Glycol, Diglycerin, and Glycerin (*id.*), meeting the moisturizer elements of claims 6 and 9.

The pH specification for this product is 6.00-7.00. (Ex. 35.) Thus, the pH of this product is likely to be in the range of 4-6.5, meeting the pH claim element of claim 9 literally or under the doctrine of equivalents.

**xi. Murad Resurgence Age-Diffusing Serum**

This product contains at least one component designated an “exfoliant.” (Ex. 36.) I conclude from this that the product is designed to facilitate removal of unwanted substances from the skin. In addition, this product is a lotion that has the same cleaning effect as the lotion products described in this report, treating dry skin and flakiness. I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

This product contains 0.1% Citrus Aurantium Dulcis (Orange) Oil. (Ex. 36.) I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

This product contains 1.0% Avena Sativa (Oat) Kernel Extract. (*Id.*) Therefore, this product meets the oat claim elements of claims 6 and 9.

This product contains several moisturizers, including Butylene Glycol and Glycerin. (*Id.*) Therefore, this product meets the moisturizer claim elements of claims 6 and 9.

The pH specification for this product is 4.00-4.50. (Ex. 37.) Thus, the pH of this product is likely to be in the range of 4-6.5, meeting the pH claim element of claim 9 literally or under the doctrine of equivalents.

**xii. Murad Resurgence Age-Balancing Night Cream**

In my opinion, this product is a lotion that has the same cleaning effect as the lotion products described above, treating dry skin and flakiness. I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

This product contains 0.1% Citrus Aurantium Dulcis (Orange) Oil. (Ex. 38.) I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

This product contains 0.1% Avena Sativa (Oat) Kernel Extract. (*Id.*) Therefore, this product meets the oat claim elements of claims 6 and 9.

This product contains several moisturizers, including Butylene Glycol, Diglycerin, and Glycerin. (*Id.*) Therefore, this product meets the moisturizer claim elements of claims 6 and 9.

The pH specification for this product is 6.00-7.00. (Ex. 39.) Thus, the pH of this product is likely to be in the range of 4-6.5, meeting the pH claim element of claim 9 literally or under the doctrine of equivalents.

**xiii. Murad Skin Perfecting Lotion**

In my opinion, this product is a lotion that has the same cleaning effect as the lotion products described above, treating dry skin and flakiness. I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

This product contains 0.1% Citrus Aurantium Dulcis (Orange) Oil. (Ex. 40.) I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

This product contains 0.1% Avena Sativa (Oat) Kernel Extract. (*Id.*) Therefore, this product meets the oat claim elements of claims 6 and 9.

This product contains several moisturizers, including Butylene Glycol, Glycerin, Honey Extract, Glycolipids, Sodium Hyaluronate, and Sodium PCA. (*Id.*) Therefore, this product meets the moisturizer claim elements of claims 6 and 9 literally or under the doctrine of equivalents.

The pH specification for this product is 6.20-7.20. (Ex. 56.) Thus, the pH of this product is likely to be in the range of 4-6.5, meeting the pH claim element of claim 9 literally or under the doctrine of equivalents.

**xiv. Murad Acne Spot Treatment**

This product also contains a number of components designated as “exfoliant.” (Ex. 41.) I conclude from this that the product is designed to facilitate removal of unwanted substances from the skin. In addition, this product is a lotion that has the same cleaning effect as the lotion

products described above, treating dry skin and flakiness. I incorporate my discussion in each other section that applies to a lotion. For these reasons, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

This product contains 0.1% Citrus Aurantium Dulcis (Orange) Oil. (Ex. 41.) I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

This product contains 3.0% Hydrolyzed Oat Flour. (*Id.*) For the same reasons that the Hydrolyzed Oat Protein in the other BBW products acts as an emulsifying agent, I conclude that it is more likely than not that the Hydrolyzed Oat Flour in this product acts as an emulsifying agent in the accused products and is made from processed oat kernels. Therefore, this product meets the oat claim elements of claims 6 and 9.

This product contains moisturizers such as Glyceryl Stearate and Allantoin. (*Id.*) Therefore, this product meets the moisturizer claim elements of claims 6 and 9.

The pH specification for this product is 3.80-4.80. (Ex. 42.) Thus, the pH of this product is likely to be in the range of 4-6.5, meeting the pH claim element of claim 9.

#### **xv. Burt's Bees Citrus Facial Scrub**

In my opinion, this product is marketed and sold (and used) as a human skin cleaning product as shown, *inter alia*, by its name. Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

According to Burt's Bees, this product contains 0.1875% orange oil (Ex. 61 at ¶ 8-b.) I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product states that it contains 32.769% oat flour in the dry herb blend (which is 44.30% of the product) (Ex. 64; Ex. 63 at ¶ 9-a and Ex. A), meeting the oat

elements of claims 6 and 9.

The pH specification for the finished product is 4.5 – 5.4. (Ex. 68.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. In addition, I have reviewed the test results and protocol used by Professor Edward Yeung to test the pH of this product. (Ex. 62.) I find the potentiometric method used to determine the pH to be accepted by Prof. Yeung's peers, including me. I conclude from the pH test result of 5.382 and the specification that this product literally meets the pH claim element of claim 9.

**xvi. Burt's Bees Orange Essence Facial Cleanser**

In my opinion, this product is marketed and sold (and used) as a human skin cleaning product as shown, *inter alia*, by its name. Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The ingredient list for this product states that it contains 1% orange oil (Ex. 65.) I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product states that it contains 5.1% oat flour or 5.1% Avena Sativa (Oat) Kernel Protein (*Id.*; Ex. 63 at ¶ 9-b and Ex. A), meeting the oat elements of claims 6 and 9.

The pH specification for the finished product is 5.5 - 7.0. (Ex. 67.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. I conclude from Prof. Yeung's pH test result of 5.798 (Ex. 62) and the specification that this product literally meets the pH claim element of claim 9.

**xvii. True Blue Spa Good Clean Foam Face Wash**

The Limited defendants' corporate designee admitted that this product is a cleaning composition for human skin. (Ex. 3 at 514:6-10.) Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The designee also testified that this product could contain orange oil. (*Id.* at 514:11-18.) The ingredient list for this product shows that it contains 0.1% Mandarin Oil Fruit Extract and 0.8% Fragrance UJ002881/00 BIO Fresh Face. (Ex. 43; Ex. 44.) Based on these ingredients as discussed above, this product contains 0.106% orange oil (0.05% from Mandarin Oil Fruit Extract and 0.056% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.05% Avena Sativa (Oat) Extract (Drago-Oat-Active; Colloidal Oat) (Ex. 43), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.2 - 7.2. (Ex. 27.) This range permits sales of the product with a pH that meets the claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

**xviii. Pure Simplicity Ginger Rejuvenating Shower Foam**

The Limited defendants' corporate designee admitted that this product is a cleaning composition for human skin. (Ex. 3 at 569:8-11.) Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The designee also testified that this product may contain orange oil. (*Id.* at 569:12-17.) The ingredient list for this product shows that it contains 1.5% Firmenich Fragrance 125887. (Ex. 45.) Based on this ingredient as discussed above, this product contains 0.015% orange oil



(all from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.5% Unitanical Oat WS R10656 (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 5.8 - 6.8. (Ex. 27.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff's counsel is 6.09. (*Id.*) That average pH is also permits sales of product that meet this claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

#### **xix. Pure Simplicity Ginger Rejuvenating Body Scrub**

The Limited defendants' corporate designee admitted that this product is a cleaning composition for human skin. (Ex. 3 at 580:20-22.) Therefore, this product literally meets the skin cleaning composition claim elements of claims 6 and 9.

The designee also testified that this product may contain orange oil. (*Id.* at 581:1-5.) The ingredient list for this product shows that it contains 2.0% Firmenich Fragrance 125887 D. (Ex. 46.) Based on this ingredient as discussed above, this product contains 0.02% orange oil from the fragrance. I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.5% Unitanical Oat WS R10655 (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.0 - 7.0. (Ex. 27.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff's counsel is 6.17. (*Id.*) That

average pH is also permits sales of product that meet this claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

**xx. Pure Simplicity Ginger Rejuvenating Body Lotion**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions.

The designee also testified that this product may contain orange oil in the fragrance. (Ex. 3 at 604:19-605:2.) The ingredient list for this product shows that it contains 1.0% Firmenich Fragrance 125887.<sup>13</sup> (Ex. 47.) Based on these ingredients as discussed above, this product contains 0.01% orange oil from the fragrance. I therefore conclude that this product contains 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.5% Unitanical Oat R10605 (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 5.8 - 6.8. (Ex. 27.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff's counsel is 6.16. (*Id.*) That average pH is also permits sales of product that meet this claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

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<sup>13</sup> This product contains 0.2% "Extract Blend D1774 WS" (Ex. 47), which the Limited defendants had not provided to plaintiff's counsel (see Ex. 3 at 605:3-13).

**xxi. Pure Simplicity Oat Oil-Control Face Moisturizer**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions. (See also Ex. 3 at 719:7-9.)

The designee also testified that this product contains orange oil. (*Id.* at 719:16-18.) The ingredient list for this product shows that it contains 0.3% Unitanical Orange Peel R10593 and 0.25% Firmenich Fragrance 161375 B White Watercress. (Ex. 48.) Based on these ingredients as discussed above, this product contains 0.12425% orange oil (0.117% from Unitanical Orange Peel and 0.00725% from the fragrance). I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.1% Unitanical Oat IN R10632 and 0.5% Unitanical Oat R10605 (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.5 - 7.5. (Ex. 27.) This range permits sales of the product with a pH that meets the claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

**xxii. Pure Simplicity Burdock Root Skin Mattifier**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions. (See also Ex. 3 at 653:17-654:19 (removes oil).)

The designee also testified that this product may contain orange oil. (*Id.* at 655:6-11.) The ingredient list for this product shows that it contains 0.75% Firmenich Fragrance 143935 B White Grapefruit Citrus. (Ex. 49.) Based on this ingredient as discussed above, this product

contains 0.03% orange oil. I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 9 as stated above.

The ingredient list for this product shows that it contains 0.5% Unitanical Oat R10605 (*id.*), meeting the oat element of claim 9 as stated above.

I conclude from Prof. Yeung's pH test result of 5.829 that this product literally meets the pH claim element of claim 9. (Ex. 62.)

#### **xxiii. Pure Simplicity Ginger Rejuvenating Body Balm**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions. (See also Ex. 3 at 698:19-699:4.)

The designee also testified that this product may contain orange oil. (*Id.* at 699:5-19.) The ingredient list for this product shows that it contains 2.0% Firmenich Fragrance 125887. (Ex. 50.) Based on this ingredient as discussed above, this product contains 0.02% orange oil. I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil element of claim 9 as stated above.

The ingredient list for this product shows that it contains 0.1% Avena Sativa (Oat) Kernel Oil, 0.1% Drago Beta Glucan and 0.5% Unitanical Oat R10605 (*id.*), meeting the oat element of claim 9 as stated above.

#### **xxiv. Pure Simplicity Ginger Rejuvenating Hand & Nail Cream**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions. (See also Ex. 3 at 620:15-16.)

The designee also testified that this product may contain orange oil. (*Id.* at 620:17-621:3.) The ingredient list for this product shows that it contains 1.0% Firmenich Fragrance

125887 B. (Ex. 51.) Based on this ingredient as discussed above, this product contains 0.01% orange oil from the fragrance. I therefore conclude that this product contains 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.5% Unitanical Oat R10605 (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.5 - 7.5. (Ex. 27.) This range permits sales of the product with a pH that meets the claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

#### **xxv. Pure Simplicity Fig Hydrating Body Balm**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions. (See also Ex. 3 at 704:7-11.)

The designee also testified that this product may contain orange oil. (*Id.* at 704:12-705:1.) The ingredient list for this product shows that it contains 2.0% Mane Fragrance 133506. (Ex. 52.) Based on this ingredient as discussed above, this product contains 0.0112% orange oil. I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil element of claim 9 as stated above.

The ingredient list for this product shows that it contains 0.1% Avena Sativa (Oat) Kernel Oil (*id.*), meeting the oat element of claim 9 as stated above.

#### **xxvi. Pure Simplicity Fig Hydrating Hand & Nail Cream**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions. (See also Ex. 3 at 642:8-643:9.)

The designee also testified that this product may contain orange oil. (*Id.* at 644:9-645:1.) The ingredient list for this product shows that it contains 1.0% Mane Fragrance 133158. (Ex. 53.) Based on this ingredient as discussed above, this product contains 0.0167% orange oil from the fragrance. I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.5% Unitanical Oat R10605 (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 6.0 - 7.0. (Ex. 27.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. It further permits sales of product with a pH that meet the claim element under the doctrine of equivalents. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

#### **xxvii. Pure Simplicity Everlasting Flower Night Nourisher**

This product literally meets the skin cleaning composition claim elements of claims 6 and 9 for the same reasons as the other Limited defendants' lotions and as the Kao defendants' lotions. (See also Ex. 3 at 431:20-433:14.)

The designee also testified that this product may contain orange oil. (*Id.* at 435:4-11.) The ingredient list for this product shows that it contains 0.5% Firmenich Fragrance 143390 E Everlasting Flower. (Ex. 54.) Based on this ingredient as discussed above, this product contains 0.0295% orange oil. I therefore conclude that this product contains more than 0.01% orange oil, meeting the orange oil elements of claims 6 and 9 as stated above.

The ingredient list for this product shows that it contains 0.5% Unitanical Oat R10605 (*id.*), meeting the oat element of claims 6 and 9 as stated above.

The pH specification for the finished product is 5.5 - 6.5. (Ex. 27.) This range is within the claimed range of 4.5-6.0 as explained above, which meet this claim element. In addition, the average pH reported on certificates of analysis provided to plaintiff's counsel is 5.42. (*Id.*) That average pH is also within the claimed range of 4.5-6.0 as stated above, which also meets this claim element. For these reasons, I conclude that this product meets the pH claim element of claim 6 of the '062 patent.

**AS FILED IN ORIGINAL REPORT FEBRUARY 28, 2006**

**VI. KBC PRODUCTS**

**REDACTED**



**REDACTED**

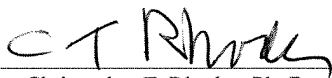
## **REDACTED**

### **VII. DOCUMENTS CONSIDERED**

In forming these opinions, I considered information provided to me by plaintiff's counsel and publicly available information. That information is listed in the Appendix that follows.

### **VIII. SUPPLEMENTATION**

My report represents my present and best opinion regarding the above matters. Should additional information or testimony become available, I reserve the right to revise or supplement my opinions, analysis or conclusions and the bases for them. I understand that I may also be called upon to provide an opinion and expert testimony to rebut opinions or proofs presented by the Limited or Kao defendants.

By:   
Christopher T. Rhodes, Ph. D.

On: March 6, 2006

**APPENDIX**Limited defendants' Documents

## BBW

003763	003685	003608
003764	003686	003598
003768 – 003775	003693	003560
001355 – 001359	003694	003562
001363	003702	003587
003577	003705	003557
003593	003706	003627
003603	003707	003573
003621	003708	003569
003622	003709	003666
003629	003710	003642
003632	003718	003687
003638	003719	
003639	003720	
003640	006052	
003652	006053 – 006054	
003658	006055	
003659	006056 – 006057	
003665	003564	
003673	003616	
003674	003548	
003675	003565	
003678	003575	
003682	003552	
003683	003571	
003684	003553	

Kao Documents

## KBC

00831 – 000888

Correspondence with Counsel for Bath & Body Works, Inc.

Counsel for Plaintiff's 2/16/06 letter to Counsel for Limited defendants

Depositions

Deposition Transcript of Jack Krause (1/24/06) including Exhibits  
 Deposition Transcript of David Story (1/6/06) including Exhibits  
 Deposition Transcript of Konstantinos Lahanas (1/18/06) including Exhibits  
 Deposition Transcript of Konstantinos Lahanas (1/19/06) including Exhibits  
 Deposition Transcript of Konstantinos Lahanas (1/27/06) including Exhibits

Other

U.S. Patent No. 5,013,485  
 Declaration of Celeste Lutrario (Burt's Bees, Inc.)  
 Exhibits to my report not otherwise identified here  
 Certain Cosmetic and Pharmaceutical Resources